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No. 99-1829

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IN THE

Supreme Court of the United States

FRANCINE A. GIANI,
DIRECTOR, UTAH DIVISION OF CONSUMER PROTECTION,
Cross-Petitioner,

v.

AMERICAN TARGET ADVERTISING, INC.,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether cross-respondent, a Virginia corporation that provides advice and consulting services to organizations engaged in direct mail communications that contain requests for voluntary contributions, may be required by the state of Utah to post a $25,000 bond or letter of credit before its clients are permitted to send mail into Utah, even though cross-respondent does not engage in solicitation and has no contact with Utah citizens.

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STATEMENT

Cross-respondent American Target Advertising (ATA), petitioner in No. 99-1647, is a Virginia corporation that provides advice and consulting services to organizations that use direct mail to publicize their views and to seek adherents and contributions. ATA challenged the constitutionality of the Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 *et seq.* That Act requires ATA and other fund-raising consultants to comply with numerous registration and disclosure requirements before any nonprofit organization they advise may send mail into Utah containing a solicitation. The provisions of the Utah Act apply to ATA even though ATA itself conducts no solicitations, sends no mail into Utah, and has no contacts with the state, other than the provision of

advice and counsel to an organization that engages in direct mail fundraising in the state.

We describe the background of this case in the petition in No. 99-1647. See 99-1647 Pet. 2-7. In brief, the United States Court of Appeals for the Tenth Circuit held that most provisions of the Utah Act could constitutionally be applied to ATA. See 99-1647 Pet. App. 1a-20a. In No. 99-1647, ATA seeks review of that decision insofar as it upholds portions of the Utah Act. In a few respects, however, the Tenth Circuit held the Utah Act unconstitutional. In this case, cross-petitioner challenges the Tenth Circuit's invalidation of a provision of the Act that requires fundraising consultants to obtain a $25,000 bond or letter of credit as a condition for registering in Utah. See Utah Code Ann. §§ 13-22-9(4); 99-1647 Pet. App. 7a-9a.

In holding the bond provision unconstitutional, the court of appeals stated that the "actual impact of the bond requirement" is to "impose[] a sizeable price tag upon the enjoyment of a guaranteed freedom." 99-1647 Pet. App. 8a. The court noted that ATA's president, in a sworn affidavit, had stated that ATA would have to provide 100% collateral for any bond and, because it did not have enough unpledged collateral on hand, would have to borrow the entire amount. *Ibid.* The court of appeals remarked that "some consultants may qualify for the required letter [of credit] without 100% collateral," but the court stated that "this possibility does not save the provision" because "the constitutionality of [the bond] requirement" should not "turn on the applicant's credit rating." *Id.* at 8a-9a. The court concluded that "[t]he chilling impact of the bond upon protected speech outweighs any fraud protection it might provide." *Id.* at 9a. Indeed, the court concluded that the Utah Act imposed so many other disclosure and registration requirements on organizations like ATA that the bond requirement was simply unnecessary. See *id.* at 8a-9a.

ARGUMENT

Cross-petitioner contends that the Tenth Circuit's decision invalidating the bond requirement is incorrect. Cross-petitioner further argues that this issue is an important one (99-1829 Pet. 8), and she asserts that the Tenth Circuit's decision on this issue conflicts with the decision of another court of appeals (*id.* at 15-16).

We agree with cross-petitioner that the issues raised by the Utah Act are, in general, of the first importance. As we explained in the petition in No. 99-1647, regulatory schemes like Utah's are common among the states, and an increasing number of local governments have enacted them as well. See 99-1647 Pet. 7-8. These regulations have potentially enormous ramifications for the free flow of information and opinion throughout the United States. Moreover, while cross-petitioner has not shown a conflict in the circuits, she is correct in saying that there is much confusion and disarray in the lower courts over the important constitutional issues raised by the Utah Act. The cross-petition thus buttresses our arguments for granting the petition in No. 99-1647.

The court of appeals' decision to invalidate the bond requirement was, however, correct. Moreover, if the Court grants the petition in No. 99-1647, its resolution of the questions presented by that petition will provide the framework needed to determine, on remand, the constitutionality of the bond requirement, should a remand be necessary. For these reasons, we believe it would serve no purpose for the Court to grant plenary review of the conditional cross-petition.

1. The arguments we make in the petition in No. 99-1647 apply equally to the bond provision, and they demonstrate why the court of appeals was correct in its conclusion that that

provision violates the First Amendment.[1] The bond requirement, like the other registration and disclosure requirements that the Utah Act imposes on fundraising consultants, is a content-based prior restraint on core political expression. See 99-1647 Pet. 9-16. As such, it is "'subject to exacting scrutiny.'" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988). The court below subjected the Utah Act only to intermediate scrutiny (see 99-1647 Pet. App. 4a), even though the Utah Act is manifestly not a time, place, and manner regulation, but rather prohibits speech entirely when its requirements are not met. Thus the court of appeals treated the Act, including the bond requirement, much more favorably than it should have been treated.

Nevertheless, even the court of appeals, applying the weaker First Amendment standard of intermediate scrutiny, perceived the paucity of the state's justifications for the bond requirement. In fact, under any standard of review, the state has—as we showed in our petition—simply provided no reason for the bond requirement, or any of the other registration and disclosure requirements imposed on fundraising consultants. The state has never explained why it cannot accomplish its objectives by reasonable regulation of the organizations that themselves solicit in Utah, without imposing a prior restraint on fundraising consultants that have no contact with Utah citizens.

The cross-petition asserts (99-1829 Pet. 10-12) that the bond requirement is needed in order to deter fraud and to provide compensation for victims. But cross-petitioner fails to explain why the state singles out for a bond requirement organizations like ATA that have no contact with Utah

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[1] For the reasons stated in the petition in No. 99-1647, the bond requirement also violates the Commerce Clause and the Due Process Clause. See 99-1647 Pet. 16-20.

citizens and that are in the business of providing services and advice—a form of speech—to nonprofit organizations that are themselves engaged in core political speech.

In this regard, the examples offered in the cross-petition of other Utah bond requirements—imposed on health spa operators and on telephone solicitors (99-1829 Pet. 11)—are revealing (although they are of course irrelevant to the merits of the issues presented by this case). Both health spa operators and telephone solicitors come into direct contact with Utah citizens. Health spa operators can claim no First Amendment protection; ATA and other fundraising consultants, by contrast, can legitimately assert both their own First Amendment rights and those of their clients. Health spa operators typically operate within the state, and therefore are most unlikely to be able to raise any of the Commerce Clause or Due Process Clause arguments that can be raised by ATA—an out-of-state firm that provides out-of-state services to organizations that merely mail letters in interstate commerce into Utah. And of course ATA is being regulated not as a solicitor, or even as a firm that engages in direct mailings, but as a consultant. Thus cross-petitioner's own examples point up not only the wholly unwarranted character of the requirements imposed on organizations like ATA but the threat that the selective imposition of such requirements presents to First Amendment (and other) rights.[2]

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[2] Similarly, cross-petitioner's assertion that the bond requirement is needed to provide for redress "[i]n today's national and global economy" (99-1829 Pet. 11-12) reveals the incompatibility of cross-petitioner's arguments with the Commerce Clause. If cross-petitioner's approach were to prevail, small businesses (or even individuals) who provide consulting services could, in principle, be required to post bonds in all fifty states merely because their clients engage in interstate commerce. This would create an insurmountable barrier to interstate commerce, and would violate the principles of fair play and substantial justice established by the Due Process Clause.

2. Although the court below correctly recognized that the bond requirement is very burdensome, the court greatly underestimated the magnitude of the burden. That is because organizations like ATA must, of course, comply not just with Utah's requirements but with the requirements of every state—and every locality—that requires a bond or that imposes some other requirement.[3] Cf. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759 (1967). As burdensome as Utah's $25,000 bond requirement is, the cumulative effect of, potentially, dozens or even hundreds of such requirements could be financially incapacitating. Even leaving aside local governments, state bonding requirements alone could potentially require ATA to make annual interest payments in the hundreds of thousands of dollars and post collateral of $1.25 million.[4]

Cross-petitioner asserts that the bond requirement only affects ATA's "ability * * * to compete" for clients, and that ATA's "inability to compete for business in this arena does not implicate the First Amendment." 99-1829 Pet. 13. This argument is wholly mistaken, for at least two reasons. First, as we showed in the petition in No. 99-1647, ATA's own First Amendment rights are abridged by the Utah Act. See 99-1647 Pet. 9-10. ATA, like many firms in its business, views its consulting activities as a means of advancing certain public policy positions, and it tends to enter into contracts with clients who have a certain ideological orientation. The Court has repeatedly recognized the First Amendment rights of speakers comparable to ATA. See, *e.g.*, *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963);

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[3] At the time of the proceedings in the district court, at least twelve states imposed bond requirements on fund-raising counsel. See C.A. App. 267, 339-46. ("C.A. App." refers to the appendix filed in the district court. In the petition in No. 99-1647, we mistakenly referred to this document as "Dist. Ct. App.")

[4] For this calculation, see C.A. App. 268-70.

Thomas v. Collins, 323 U.S. 516, 531 (1945). Cross-petitioner's suggestion (99-1829 Pet. 6) that what is involved here a "failure to compete" on the part of ATA (which is, in fact, one of the best-known and most highly respected agencies of its kind in the nation) files in the face of this Court's statement that "[f]reedom of speech * * * is available to all, not merely to those who can pay their own way." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

Second, even if cross-petitioner were correct in saying that only the rights of ATA's clients are at stake, she simply ignores this Court's holding in *Meyer v. Grant, supra*, when she asserts that the First Amendment is unaffected by government action that effectively prevents nonprofit organizations from hiring ATA as counsel. In *Meyer*, the Court unanimously struck down a Colorado statute that prohibited proponents of initiatives from paying petition circulators. The state in *Meyer* argued—as cross-petitioner does here—that the restriction did not violate the First Amendment because the proponents had other ways to collect signatures. This Court flatly rejected that argument. See 486 U.S. at 424. This Court stated: "The First Amendment protects [the initiative proponents'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Ibid.* The same principle applies to nonprofit organizations that believe "the most effective means" of "advocat[ing] their cause" is to retain fundraising counsel, and who find their ability to do so impaired by the bond requirement or the other provisions of the Utah Act.

3. Cross-petitioner asserts that the decision of the court below conflicts with the Sixth Circuit's decision in *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F. 3d 1474 (6th Cir. 1995), cert. denied, 517 U.S. 1135 (1996). The Tenth Circuit distinguished *Dayton Area* on the ground that the Sixth Circuit was reviewing the denial of a preliminary

injunction and thus applying a different standard of review from the court below. See 70 F. 3d at 1486. Both the court below and cross-petitioner, however, overlook a more important distinction: the bonding requirement upheld in *Dayton Area* applied to "[p]rofessional solicitors" who were required to post the bond before engaging in solicitation. See *id.* at 1478. Utah seeks to regulate ATA not as a solicitor but as a fundraising consultant that does not engage in solicitation at all.

Nevertheless, cross-petitioner is correct to suggest that the lower courts have struggled with the implications of this Court's decisions in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), *Secretary of State v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Cross-petitioner notes that *Heritage Publishing Co. v. Fishman*, 634 F. Supp. 1489, 1502 (D. Minn. 1986), upheld a bond requirement that the state of Minnesota imposed on a professional fundraiser. (Again this was a requirement imposed not on consultants but on professional fundraisers "who solicit funds on behalf of charitable organizations within Minnesota" (*id.* at 1493).) But another district court invalidated a bonding requirement that Los Angeles ordinances imposed on professional fundraisers. See *Gospel Missions v. Bennett*, 951 F. Supp. 1429, 1447 (C. D. Cal. 1997). This further demonstrates the need for this Court to review the constitutional issues raised by the Utah Act, even though, for reasons we have stated, the petition in No. 99-1647, rather than the conditional cross-petition, provides the appropriate vehicle.

4. Finally, cross-petitioner suggests that ATA was compensated by its client, Judicial Watch, at an excessively high rate. See 99-1829 Pet. 13. Cross-petitioner does not explain how this discussion is relevant to the question whether the cross-petition should be granted. In any event the

discussion is highly misleading, in several respects. The cross-petition relies on reports from state attorneys general, who, because they are defending regulatory schemes imposed on direct mail fundraising, are interested parties. Perhaps as a result, these reports systematically understate the costs of fundraising, and therefore understate the percentage of net proceeds that the nonprofit organizations receive. See C.A. App. 521-22.[5] In addition, cross-petitioner fails to note that the return to Judicial Watch was not atypical for the first year of direct mail fundraising, when costs must be incurred to build a donor base; in subsequent years, the return to the nonprofit organization increases. Cross-petitioner's misleading and irrelevant portrayal of the relationship between ATA and its client is a further demonstration of what can happen when the government appoints itself the custodian of First Amendment rights, and of why the government should not be allowed to place itself between a speaker and the potential audience, as the Utah Act does in this case.

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[5] In the court of appeals, ATA pointed out some of the misleading and potentially damaging information disseminated by some of the state attorneys general who use registration laws similar to the Utah Act. See Appellant's Brief in Response to Minnesota Brief 3-8.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the conditional cross-petition and then dispose of it as appropriate after plenary review of No. 99-1647.

Respectfully submitted,

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